FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., AND WARREN G. SUNDAY,
Petitioners,

vs.

LINDA KAY SPARKMAN AND LEO SPARKMAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

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I.

THE INFERENCE OF SECRETIVENESS IS UNSUPPORTED. RESPONDENTS CONCEDE ALL BUT "JUDICIAL ACT".

In the Statement of the Case in Respondents' Brief, it is asserted for the first time that the petition in question was not submitted to Judge Stump in the courthouse, the courtroom or the judge's chambers. Such inferential statements are totally unsupported. That the petition does not carry a file mark is undisputed. Respondents, in their brief, produce no authority stating that a court of general jurisdiction requires such for-

mality before it may act pursuant to the jurisdiction conferred upon it. Formality is customarily entirely dispensed with as in the case of underaged persons intending to marry. They may petition, "either orally or by written petition the judge of the circuit court". I. C. § 31-1-1-4.

The entire thrust of Respondents' Brief is focused upon the presumptive conclusion that the approval of Judge Stump appended to the petition submitted by the mother of Linda Kay Sparkman was not signed by him as a judge and was not a judicial act.

In addition, the proceedings are now characterized as having been presented "in some secretive manner to Judge Stump, and he signed the sterilization approval in some equally secretive manner still not revealed." (Respondents' Brief, p. 19)

These unsupported presumptions culminate in the conclusion by Respondents that the act of approval was a "classic example of a non-judicial act." (Respondents' Brief, pp. 22 and 23)

Respondents, by their failure to meet and answer the arguments set forth in Brief for the Petitioners, must be deemed to have conceded the accuracy and validity of the following:

1. The General Jurisdiction Statute, I. C. § 33-4-4-3, in effect in the year 1971, gave Judge Harold D. Stump jurisdiction of all causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.

2. Indiana Code § 16-8-3-1 & 2, in effect in 1971, provided for medical or surgical treatment of an incompetent and that consent for such treatment may be given by the parent having custody of such minor.

3. Neither of said statutes had been given any narrow construction by any Indiana court until 1975, four years later, when it was determined that I. C. § 16-8-3-1 & 2 do not permit sterilization.

4. I. C. § 16-8-3-1- & 2 do not provide, by their terms, for any formal context in which the consent of the parent is to be given.

5. Unless an act is done in the clear absence of all jurisdiction and this fact is known to the judge, acts of judges performed in the course of their official functions are immune from civil liability.

6. Whenever a court's general jurisdiction over the subject-matter is invoked, the court has the right to determine if it has the power to determine if it has jurisdiction to proceed to dispose of the matter.

7. Judicial immunity is not lost through procedural errors, irregularities or deficiencies of a circuit court judge's acts.

8. So long as subject-matter jurisdiction of a court is invoked, subsequent procedural irregularities will not destroy the court's immunity.

9. The terms "jurisdiction" and "judicial function" are given broad definition.

II.

THE MOTHER'S VERIFIED PETITION CONFERRED JURISDICTION OVER HER DAUGHTER.

Failure to give notice and to appoint a guardian ad litem on behalf of Linda Kay Sparkman are erroneously characterized in Respondents' Brief as being "devoid of judicial concern for the interests and well-being of the young girl".

The court's jurisdiction over the young girl was invoked by the mother's verified petition. If notice was to be given to the young girl, the notice was presumed to have been supplied to her through the mother, her natural guardian.

Respondents are apparently horrified by the fact that the interests of a child were dealt with by a court without causing a guardian to be appointed for said child and presumably an attorney to represent her. Such dispositions are, however, com-

monplace and Respondents must understand that. In every divorce action in which there are minor children, disposition of their interests is made in the award of custody, amounts of support, directions for educational and religious training, specific medical treatment and visitation rights. All this is traditionally and customarily done without notice to the minor, without the appointment of a guardian ad litem and, of course, without the appointment of an attorney to represent the minor. Respondents cannot seriously suggest that a court of general jurisdiction does not possess, by the fact of such jurisdiction, power to dispose of the interests of minor children under such circumstances by virtue of the petition and testimony of the natural parent and guardian of said children, absent notice or specific representation on behalf of the children.

Such is obviously the case with which Judge Stump was confronted upon the verified petition of Ora McFarlin. If Ora McFarlin failed to notify her daughter of the contents of the petition or if Dr. John Hines or other medical defendants failed to advise Linda Sparkman, and if such failure is found to be culpable, Linda Sparkman has preserved her remedy against such persons for such failure with her residual right to proceed against them in state court.

III.

RESPONDENTS CONCEDE THE APPROVAL WAS NOT AN ORDER.

Respondents do not contest the fact that Judge Stump had subject-matter jurisdiction over the contents of the petition. Respondents admit that Judge Stump had jurisdiction to determine if he had jurisdiction over Linda Sparkman. Respondents do not refute the conclusion of District Court Judge Eschbach, to wit: By submitting her petition, "Mrs. McFarlin consented to the performance of the operation . . ." (Memorandum of Decision and Order, App. to Petition for Writ of Certiorari, p. A3.) It has already been shown that the Judge acquired

jurisdiction to deal with Linda Kay Sparkman by virtue of the verified statements contained in the petition filed by her mother.

Both Respondents and the Court of Appeals have previously improperly attempted to characterize Judge Stump's approval of the petition as an "order". Having failed in that attempt, Respondents now, in a complete reversal of position, attempt to characterize the approval as a non-judicial act and, therefore, a nullity. If that be true, Judge Stump should not be a party defendant in this litigation and the Memorandum and Decision of the Federal District Court dismissing the action be upheld, for the reason that no state action was involved and, therefore, no action may be maintained by Respondents under 42 U. S. C. A. § 33 1983-1985.

"Nullity" is defined as "nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect." *Black's Law Dictionary*, Revised 4th Ed., p. 1216. Again, if Respondents' position is to be given credence, no judicial doctrine need be applied to anything done by Judge Stump since he does not belong in this litigation as a party.

IV.

AT ALL TIMES, JUDGE STUMP ACTED IN HIS JUDICIAL CAPACITY.

Although the position adopted by Respondents presents Judge Stump with an easily accessible exit from this litigation, there remains the more logical assessment of his action.

It has been shown that his approval of the petition cannot be construed to be an order. However, to take the position that the Judge executed the approval in a role other than as Judge of the DeKalb Circuit Court requires an abandonment of common sense or an assumption that Ora McFarlin and her attorney, Warren G. Sunday, purposely engaged in a totally useless act in preparing and presenting the Verified Petition. Placing such a construction upon the facts strains credulity.

Unquestionably, the Verified Petition of Ora McFarlin was presented to Harold D. Stump in his capacity as the duly elected and acting Judge of the Circuit Court of DeKalb County and it was in that capacity that he signed the approval. The effect of that approval may be of very slight significance, but the act of approval was unquestionably a judicial act. For the reasons set forth in Petitioners' Brief and undisputed by Respondents, said act of approval is entitled to be clothed with judicial immunity.

V.

BRIEF AMICUS: AMERICAN CIVIL LIBERTIES UNION, ET AL.

Should the Court grant the motions of the American Civil Liberties Union, et al. to file its Amicus Brief, the following is a reply to the pertinent portions of the Brief.

Said Petitioners' assertion (p. 9):

> "Apparently, Petitioners' argument is that once a judge demonstrates that he had subject-matter jurisdiction, he is protected by judicial immunity, even if he acted without any semblance of personal jurisdiction."

Such misstatements are characteristics of this particular Brief as will be herein pointed out. Subject-matter jurisdiction is concededly and unquestionably vested in Judge Harold D. Stump. The Verified Petition itself, presented by the mother of Linda Kay Sparkman and on her behalf vested the court with sufficient jurisdiction to issue the approval. Reference is made to *Randall* v. *Brigham*, 74 U. S. 285 (1869), here reiterated for purposes of emphasis, in which the court stated:

> ". . . the information imparted by the letter was sufficient to put into motion the authority of the court." (p. 293)

Yaselli v. *Goss*, 12 F. 2d 396 (2d Cir. 1926), cited as some sort of presumed authority reaffirms all the principles set forth in *Bradley* v. *Fisher*, *supra*, *Randall* v. *Brigham*, *supra*, and specifically holds:

> "(p. 41) With respect to all judicial officers—Justices of the Peace, as well as Judges of the higher courts—the settled law of the Supreme Court of the United States, and I think the plain inclination of the Supreme Court of this State, is that, where they act within their jurisdiction, they are not amenable to any civil action for damages. No matter what their motives may be, they cannot be inquired into."

The special prosecutor, in that case, was held to be immune. Considerable reliance is placed upon *Wade* v. *Bethesda Hospital*, 357 F. Supp. 671 (S. D. Ohio, 1971). This case and cases like it have been fully discussed in Petitioners' Brief and are, of course, distinguishable from the present fact situation, for the reason that authority to act in each instance and particularly in *Wade* had been proscribed by legislation.

None of the cases cited by Petitioner American Civil Liberties Union in support of the proposition

> "Indiana law provides no immunity for acts taken in the clear absence of personal jurisdiction." (p. 15)

supports said proposition.

Dietrichs v. *Shaw*, 43 Ind. 175, 179 (1873) involved the actions of a justice of the peace, a judicial official with limited jurisdiction. The case was not concerned with an approval. A man was ordered jailed pursuant to a void warrant.

State v. *Libbert*, 96 Ind. A. 84, 90, 177 N. E. 873, 875 (1931) involved a mayor acting as a city judge with limited jurisdiction. He was found to be immune for his acts. The case stands as substantially supportive of the position espoused by Judge Stump. The case states (p. 874):

> "That by 'jurisdiction of the subject-matter' is not meant simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs."

Libbert further holds (p. 875):

> "There is a distinction that must be kept in mind in cases with a question to be decided by a court is whether there

> is any jurisdiction, and in a doubtful case the judge is not to be penalized when he decides that he has jurisdiction, and on appeal the higher court may decide he had none."

State ex rel. Board of Sanitary Commissioners v. *Superior Court*, 220 N. E. 2d 336 (1966) (p. 17 Amicus Brief of American Civil Liberties Union) involves the propriety of an issuance of a Writ of Prohibition and states:

> "Jurisdiction is the right and authority to hear and determine a cause of action, in this case, the equitable remedy of injunction."

The case has nothing whatsoever to do with judicial immunity.

Finally, *State* v. *Wolever*, 26 N. E. Rptr. 762 (1891) (p. 16 Civil Liberties Brief) establishes with considerable eloquence the bases of the doctrine of judicial immunity in Indiana. It dwells upon the important distinction, regarding the application of the doctrine, between courts of limited jurisdiction and courts of general jurisdiction.

With respect to the doctrine as it exists in Indiana, the court states (p. 764):

> "While it may at first blush seem unjust to assert a rule so broad [judicial immunity] as to cover cases of alleged fraud, corruption, or oppression . . . reflection will show that it is not only based upon almost innumerable precedents, running back to time immemorial, but that it is founded upon broad principles of right of the soundest public policy. . . . it is absolutely essential, not only to the well being of society, but to the preservation of our government in its integrity, that the independence of the judiciary be preserved. By this is not meant that they should not be held responsible for official misconduct. Our laws wisely provide for their punishment criminally for official malfeasance, and the Constitution makes for provision for their impeachment and removal in a proper case. This, however, is a recognition of their responsibility to the public—to the state—and not to the individual. . . ."
>
> ". . . whenever, therefore, the state confers judicial powers upon an individual, it confers them with full immunity from private suits."

> ". . . it is said, however, that while this may be the rule with respect to courts of general jurisdiction, it is not the rule as applied to courts of special or limited jurisdiction. . . . When a court of limited jurisdiction has in a given case jurisdiction of the subject-matter and of the persons interested, the same immunity is accorded to the judge or magistrate that is in any case accorded to the judge of a court of general jurisdiction. And here we would remark that by 'jurisdiction of the subject-matter' is not meant simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs (citation). In the latter case, it is said that by 'subject-matter' is meant the abstract thing, and not the particular case. *It is said that in courts of general jurisdiction an action never lies against the judge because he has jurisdiction of all causes.* (Emphasis added.) In courts of limited jurisdiction, it lies only when he exceeds that jurisdiction, and therefore is not in the exercise of his judicial authority."

Finally, in defining "excess of jurisdiction" in Indiana, the court says:

> "In our opinion, there is such excess of jurisdiction only when the entire action of the court has been extra-jurisdictional—that is, when he has assumed the jurisdiction which has never existed; . . ."

The Brief Amicus of Civil Liberties Union suffers from a loss of credibility and relevance because of such attempts to misstate authority in support of insupportable contentions. Said Petitioners' efforts (p. 27 of its Brief) to deprive the Circuit Courts of Indiana of subject-matter jurisdiction over the contents of the petition here in question are an example of intentional distortion. Ignored is the fundamental concept in applying the doctrine of judicial immunity that said immunity is lost by a court of general jurisdiction only when it acts in "clear absence of all jurisdiction", *Bradley* v. *Fisher*, 13 Wall. 335. The test for clear absence of all subject-matter jurisdiction is "a definitive statutory or common law bar". *Jacobson* v. *Schaefer* (7 Cir. 1971), 441 F. 2d 127.

The legislative enactments of I. C. § 16-13-13-3 contain no definitive express statutory prohibition of Judge Stump's jurisdiction to deal with Ora McFarlin's petition, said statutes being confined to the establishment of procedures for the sterilization of institutionalized persons. The attempt by Civil Liberties to apply the interpretative doctrine of *expressio unius est exclusio alterius* is and should be unavailing since it has never been applied in the context of the application of the doctrine of judicial immunity, and to apply it to defeat judicial immunity under the facts of this case would be to engage in "nice questions of jurisdiction", prohibited in applying the doctrine. *Sullivan* v. *Kelleher* (1st Cir. 1968), 405 F. 2d 486.

The remaining portions of Civil Liberties Amicus Brief are of no value because of the unfounded conclusions and unsupported legal principles scattered throughout.

VI.

REPLY TO BRIEF AMICUS CURIAE: NATIONAL CENTER FOR LAW AND THE HANDICAPPED.

The Amicus Brief of the National Center for Law and the Handicapped, Inc. is largely irrelevant. If it has value, that value is negative in that its entire thrust is emotional, its only concern being to repeatedly cry out against the outrage of sterilization.

At the outset, in its Statement of the Case, it erroneously and improperly states:

> "Judge Stump signed the petition, thus ordering the sterilization." (p. 3)

It advises the court that *Wade* v. *Bethesda Hospital, supra,* is a reliable authority to support its position.

It proceeds upon the erroneous presumption that in order for a court of general jurisdiction to be entitled to immunity, its acts must be founded upon specific, permissive legislative enactments, ignoring the undisputed rule with respect to judicial immunity hereinbefore set out.

It erroneously presumes that every act of a court of general jurisdiction is appealable and that any act, presumably, which cannot be appealed amounts to a denial of due process.

It proposes that the right to appeal is an essential element for the justification of the doctrine of judicial immunity, citing as authority for that position some Law Review articles. This Amicus Brief ignores the precepts of judicial immunity set forth in *State ex rel. Egan* v. *Wolever, supra,* to-wit (p. 764):

> It is absolutely essential not only to the well-being of society, but to the preservation of government in its integrity, that the independence of the judiciary be preserved. By this is not meant that they should not be held responsible for official misconduct. Our laws wisely provide for their punishment criminally for official malfeasance, and the Constitution makes provision for their impeachment and removal in a proper case. *This, however, is a recognition of their responsibility to the public—to the state—and not to the individual.* (Emphasis added.)

VII.

BRIEF AMICUS CURIAE: AMERICAN COALITION OF CITIZENS WITH DISABILITIES, ET AL.

The Amicus Brief of the American Coalition of Citizens With Disabilities, et al., is similar to the other Amicus Briefs in its remarkably bold distortions. This Brief likewise presumes that an order was issued by Judge Stump. Apparently because its authors wished it were so, the Brief asserts, as do the others, that because the court's act was not by specific permissive legislation authorized, it was undertaken without any jurisdiction whatsoever.

The Brief cites *Wade* v. *Bethesda Hospital, supra,* as supportive authority.

It attempts to mislead the court (p. 21) by stating that at the time the Judge's approval was signed in 1971, there was a case in Indiana which specifically prohibited parents from consenting to surgical sterilization of their children. As previously ind-

cated, *A. L. v. G. R. H.*, 325 N. E. 2d 501, was a case of first impression in Indiana and was decided in 1975.

This Amicus concedes that Judge Stump possessed jurisdiction to consider the petition and likewise concedes that he had jurisdiction to determine if he had jurisdiction but then, without citing any authority whatsoever, simply asserts that his act of approval was "beyond his judicial authority". (p. 26)

Looking back, it might be said that on the innumerable occasions judges have made mistakes, it would appear that they acted beyond their judicial authority. Herein lies the core of the complaint of all Amici: They want the doctrine of judicial immunity abolished or so altered that judges, even judges of courts of general jurisdiction, would labor under a continual threat of liability. They want the right to subject the judiciary to ridicule.

Implicit within the doctrine of judicial immunity is the notion of final authority. When it was stated that there is an "aura of deism which surrounds the bench" it was to advise that judges of courts of general jurisdiction are, except in those instances where their acts have been specifically proscribed, answerable to no man.

Respectfully submitted,

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